

The illiberal vision of neo-Brandeisian antitrust

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[Geoffrey A. Manne](#)

Following is the (slightly expanded and edited) text of my remarks from the [panel](#), *Antitrust and the Tech Industry: What Is at Stake?*, hosted last Thursday by CCIA. Bruce Hoffman (keynote), Bill Kovacic, Nicolas Petit, and Christine Caffarra also spoke. If we're lucky Bruce will post his remarks on the FTC website; they were very good.

(NB: Some of these comments were adapted (or lifted outright) from a forthcoming Cato Policy Report cover story co-authored with Gus Hurwitz, so Gus shares some of the credit/blame.)

The urge to treat antitrust as a legal Swiss Army knife capable of correcting all manner of social and economic ills is apparently difficult for some to resist. Conflating size with market power, and market power with political power, many recent calls for regulation of industry — and the tech industry in particular — are framed in antitrust terms. Take Senator Elizabeth Warren, [for example](#):

[T]oday, in America, competition is dying. Consolidation and concentration are on the rise in sector after sector. Concentration threatens our markets, threatens our economy, and threatens our democracy.

[And she is not alone](#). A [growing chorus](#) of advocates are now calling for invasive, "[public-utility-style](#)" [regulation](#) or even the [dissolution](#) of some of the world's most innovative companies essentially because they are "too big."

According to critics, these firms impose all manner of alleged harms — from fake news, to the demise of local retail, to low wages, to the veritable destruction of democracy — because of their size. What is needed, [they say](#), is industrial policy that shackles large companies or effectively mandates smaller firms in order to keep their economic and political power in check.

But consider the relationship between firm size and political power and democracy.

Say you're successful in reducing the size of today's largest tech firms and in deterring the creation of new, very-large firms: What effect might we expect this to have on their political power and influence?

For the critics, the effect is [obvious](#): A re-balancing of wealth and thus the reduction of political influence away from Silicon Valley oligarchs and toward the middle class — the “rudder that steers American democracy on an even keel.”

But consider a few (and this is by no means all) countervailing points:

To begin, at the margin, if you limit firm growth as a means of competing with rivals, you make correspondingly more important competition through political influence. Erecting barriers to entry and raising rivals’ costs through regulation are [time-honored American political traditions](#), and rent-seeking by smaller firms could both be more prevalent, and, paradoxically, ultimately lead to *increased* concentration.

Next, by imbuing antitrust with an ill-defined set of vague political objectives, you also make antitrust into a sort of “[meta-legislation](#).” As a result, the return on influencing a handful of government appointments with authority over antitrust becomes huge — increasing the ability and the incentive to do so.

And finally, if the underlying basis for antitrust enforcement is extended beyond economic welfare effects, how long can we expect to resist calls to *restrain* enforcement precisely to further those goals? All of a sudden the effort and ability to get exemptions will be massively increased as the persuasiveness of the claimed justifications for those exemptions, which [already encompass non-economic goals](#), will be greatly enhanced. We might even find, again, that we end up with even *more* concentration because the exceptions could subsume the rules.

All of which of course highlights the fundamental, underlying problem: If you make antitrust more *political*, you’ll get less democratic, more politically determined, results — precisely the opposite of what proponents claim to want.

Then there’s democracy, and calls to break up tech in order to save it. Calls to do so are [often made](#) with reference to the original intent of the Sherman Act and Louis Brandeis and his “curse of bigness.” But intentional or not, these are rallying cries for the assertion, not the restraint, of political power.

The Sherman Act’s origin was ambivalent: although it was intended to proscribe business practices that harmed consumers, it was also intended to allow politically-preferred firms to maintain high prices in the face of competition from politically-disfavored businesses.

The years leading up to the adoption of the Sherman Act in 1890 were characterized by dramatic growth in the efficiency-enhancing, high-tech industries of the day. For many, the purpose of the Sherman Act was to stem this growth: to prevent *low* prices — and, yes, large firms — from “driving out of business the small dealers and worthy men whose lives have been spent therein,” in the words of [Trans-Missouri Freight](#), one of the early Supreme Court decisions applying the Act.

Left to the courts, however, the Sherman Act didn’t quite do the trick. By 1911 (in *Standard*

*Oil and American Tobacco*) — and reflecting consumers' preferences for low prices over smaller firms — only “unreasonable” conduct was actionable under the Act. As one of the prime intellectual engineers behind the Clayton Antitrust Act and the Federal Trade Commission in 1914, Brandeis played a significant role in the (partial) legislative and administrative overriding of the judiciary's excessive support for economic efficiency.

Brandeis was motivated by the belief that firms could become large only by *illegitimate* means and by *deceiving* consumers. But Brandeis was no advocate for consumer sovereignty. In fact, consumers, in Brandeis' view, needed to be saved from themselves because they were, at root, “servile, self-indulgent, indolent, ignorant.”

There's a lot that today we (many of us, at least) would find anti-democratic in the underpinnings of progressivism in US history: anti-consumerism; racism; elitism; a belief in centrally planned, technocratic oversight of the economy; promotion of social engineering, including through eugenics; etc. The aim of limiting *economic* power was manifestly about stemming the threat it posed to powerful people's conception of what *political* power could do: to mold and shape the country in their image — what economist Thomas Sowell calls [“the vision of the anointed.”](#)

That may sound great when it's your vision being implemented, but today's populist antitrust resurgence comes while Trump is in the White House. It's baffling to me that so many would expand and then hand over the means to design the economy and society in their image to antitrust enforcers in the executive branch and presidentially appointed technocrats.

Throughout US history, it is the courts that have often been the bulwark against excessive politicization of the economy, and it was the courts that shepherded the evolution of antitrust away from its politicized roots toward rigorous, economically grounded policy. And it was progressives like Brandeis who worked to take antitrust away from the courts. Now, with efforts like [Senator Klobuchar's merger bill](#), the “New Brandeisians” want to rein in the courts again — to get them out of the way of efforts to implement their “big is bad” vision.

But the evidence that big is actually bad, least of all on those non-economic dimensions, is thin and contested.

While Zuckerberg is grilled in Congress over perceived, endemic privacy problems, politician after politician and news article after news article rushes to assert that the real problem is Facebook's size. Yet there is no convincing analysis (maybe no analysis of any sort) that connects its size with the problem, or that evaluates whether the asserted problem would actually be cured by breaking up Facebook.

Barry Lynn [claims](#) that the origins of antitrust are in the checks and balances of the Constitution, extended to economic power. But if that's right, then the consumer welfare standard and the courts are the only things actually restraining the disruption of that order. If there may be gains to be had from tweaking the minutiae of the process of antitrust

enforcement and adjudication, by all means we should have a careful, lengthy discussion about those tweaks.

But throwing the whole apparatus under the bus for the sake of an unsubstantiated, neo-Brandeisian conception of what the economy should look like is a terrible idea.

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